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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE, *ET AL.*,
Petitioners,

v.

EDWARD J. and DEBORA A. DAVENPORT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF
THE COMMONWEALTH OF VIRGINIA
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Commonwealth of Virginia views the decision of the Third Circuit Court of Appeals in this case as a serious threat to the criminal justice system. Not only did the Court of Appeals wrongly decide that criminal restitution is a dischargeable "debt" in a Chapter 13 bankruptcy (thereby turning on its head this Court's decision in *Kelly v. Robinson*, 479 U.S. 36 (1986)), but the language of the decision is so broad as to include even criminal fines as dischargeable "debts". With such a holding, the federal bankruptcy courts will be in a position to interfere with state court imposed criminal sanctions to an even greater degree than was considered inappropriate in *Kelly* (479 U.S. at 47-49). If both criminal restitution orders and criminal fines are dischargeable in a Chapter 13 bankruptcy, incarceration may become the only effective measure available to criminal courts to punish and rehabilitate convicted offenders.

Accordingly, the Commonwealth of Virginia supports the Commonwealth of Pennsylvania in urging this Court to review the Third Circuit's decision, and asks the Court to consider the far-reaching implications of that decision as to criminal fines as one more reason (in addition to the reasons cited by Pennsylvania in its petition and by Connecticut in its amicus brief) to grant review.

SUMMARY OF ARGUMENT

The essence of amicus' argument was succinctly stated by the District Court which was reversed by the Third Circuit in this case. In *Davenport v. Com. of Pa., Dept. of Public Welfare*, 89 B.R. 428, 430 (E.D. Pa. 1988), Judge Shapiro stated:

> It is essential that state courts are able to impose penal sanctions other than incarceration without fear that a federal court will render this punishment nugatory after the fact.

Apparently, the Third Circuit does not consider this ability to be essential. Amicus submits that it is, indeed, essential, and that this Court has gone to great lengths in the *Kelly v. Robinson* decision to explain why it is essential. Accordingly, amicus urges this Court to review the Third Circuit's decision reversing Judge Shapiro, because that decision leaves incarceration as the only available criminal sanction which cannot be defeated by the bankruptcy courts.

ARGUMENT

In holding that criminal restitution orders are dischargeable in a Chapter 13 bankruptcy, the Third Circuit has used language indicating that all criminal penalties, including fines, penalties and forfeitures, are dischargeable "debts" under Chapter 13. For example, the court states:

> As the Court determined in *Kelly*, criminal restitution obligations fall within the category of a fine, penalty or forfeiture" under §523(a)(7). Although Congress did incorporate into Chapter 13 one of the ten exceptions under section 523(a), it did not, notably, incorporate the provision relevant here, section 523(a)(7) pertaining to criminal restitution, or any facsimile thereof . . . . Congress' considered decision to adopt only one of the section 523(a) exceptions to discharge for Chapter 13 and its concomitant failure to adopt the *criminal penalties provision* or any similar exception compels the conclusion that *such penalties, including criminal restitution*, are dischargeable under Chapter 13. *Cf. Kelly*, 479 U.S. at 50, 107 S.Ct. at 361. (871 F.2d at 428) (Emphasis added.)

Later on the same page, the court states:

> Here, Congress has codified the *criminal penalties* exception to discharge and has chosen not to apply the exception to Chapter 13 bankruptcy. (Emphasis added.)

and on page 428, the court states:

> We thus decline to second-guess Congress and refuse to insinuate language into its legislation excepting *criminal penalties* from the definitions of "claim" or "debt." (Emphasis added.)

In addition, in discussing Justice Mar .all's dissent in *Kelly v. Robinson*, the court says:

> Noting that only debts are subject to discharge under the Code, Justice Marshall reasoned that if restitution orders *and other criminal penalties* were not debts, there would be no need to except them from discharge under Chapter 7. *Kelly*, 479 U.S. at 58, 107 S. Ct. at 365. We find this reasoning persuasive and conclude that Congress must have recognized that such obligations were debts within the

meaning of the Code. *See Kelly*, 479 U.S. at 58, 107 S. Ct. at 365 (dissent); *In re Heincy*, 78 B.R. at 248; *In re Cullens*, 77 B.R. at 828.

The Court's analysis in *Kelly* also provides an apt response to the argument that criminal restitution is not a debt when such restitution is ordered primarily to rehabilitate the offender rather than to compensate the victim. As the Court held, section 523(a)(7) excepts from discharge criminal restitution precisely because that penalty is imposed primarily for punitive and rehabilitative purposes, and only incidentally for purposes of compensating the victim. The statutory exception to discharge logically leads to the conclusion not only that criminal restitution orders are debts under the Code but also that such penalties are debts despite the underlying motivations of punishment and rehabilitation. Therefore, we hold that restitution obligations constitute debts even when the state's primary objectives in imposing such obligations are to rehabilitate and to punish the offender, rather than to compensate the victim. (871 F.2d at 426-427) (Emphasis added.)

The Third Circuit cites Justice Marshall's dissent in the *Kelly* case, and *In re Heincy*, 78 B.R. 246 (9th Cir. BAP 1987) and *In re Cullens*, 77 B.R. 825 (Bkrtcy. D. Colo. 1987), in support of its holding that criminal penalties, in addition to restitution, are dischargeable debts in a Chapter 13 bankruptcy, even though none of the cases dealt with criminal penalties other than restitution. In addition, the Bankruptcy Court decision underlying the Third Circuit's decision contains language stating that criminal fines are dischargeable, even though criminal fines were not the issue before the court. In *In re Davenport*, 83 B.R. 309, 316 (Bkrtcy. E.D. Pa. 1988), *rev'd sub nom. Davenport v. Com. of Pa., Dept. of Public Welfare*, 89 B.R. 428 (E.D. Pa. 1988), the court makes the startling statement that "there is no dispute that § 1328(a) discharges criminal fines and penalties," and, on page 315, that "fines, penalties and forfeitures, made payable to governmental units, are made dischargeable in Chapter 13." The court cites nothing in support of either statement, however.

Amicus submits that there is, in fact, a dispute about whether criminal fines and penalties are dischargeable in a Chapter 13 bankruptcy. Most courts which have had the precise issue before them have held that criminal fines are *not* dischargeable debts under Chapter 13. *See, In Re Norman*, 95 B.R. 771 (Bkrtcy. D. Colo. 1989); *In Re Ferris*, 93 B.R. 729 (Bkrtcy. D. Colo. 1988); *In Re Kohr*, 82 B.R. 706 (Bkrtcy.

M.D. Pa. 1988); *In Re Jacobson*, 35 B.R. 40 (Bkrtcy. D. Ariz. 1983). Amicus has found only two decisions holding that a criminal fine is a dischargeable debt under Chapter 13, where that issue was actually before the court. Both of those cases, *In Re Gilliam*, 67 B.R. 83 (Bkrtcy. M.D. Tenn. 1986) and *In Re Young*, 10 B.R. 17 (Bkrtcy. S.D. Cal. 1980), were decided prior to *Kelly v. Robinson*, in which this Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of § 101(4)." 479 U.S. at 50.

The Commonwealth of Pennsylvania has argued in its Petition that the Third Circuit's decision as to restitution orders hampers the flexibility of state (and, presumably, federal) criminal courts by greatly reducing the effectiveness of restitution as an alternative criminal sanction. The *amicus curiae* brief filed by the State of Connecticut echoes that argument. The Commonwealth of Virginia does not wish to repeat those arguments, but submits that the impact of the Third Circuit's decision on the criminal justice system is even greater than the Pennsylvania and Connecticut briefs have suggested, because the decision will be read as applying not only to criminal restitution orders but to criminal fines as well. Pennsylvania and Connecticut have limited their briefs to the issue of restitution because that was the actual issue before the Third Circuit. It appears, however, that under the Third Circuit's reasoning, incarceration alone would be considered a nondischargeable penalty in a Chapter 13 bankruptcy. Amicus believes it is quite apparent that the arguments made by Pennsylvania and Connecticut regarding the need for this Court to review this case apply even more strongly when it is understood that the decision makes dischargeable not only restitution orders but criminal fines and other penalties as well.

Restitution is a valuable tool in meting out an appropriate punishment to criminal offenders. A criminal fine is a valuable tool as well. The Third Circuit's decision hampers the usefulness of both tools. It is quite likely that criminal offenders will file for bankruptcy if they can thereby discharge criminal fines and restitution orders. The impact on the criminal justice system, and the public confidence in that system, is predictible if criminal penalties are so easily avoided. Criminal courts will be forced to consider incarceration as the only effective penalty, even for lesser offenses, but overcrowded prisons will prevent increased use of incarceration. The public will lose confidence in the ability of the criminal justice system to effectively punish criminals if incarceration cannot be imposed as a practical matter, and criminal fines and restitution can be so easily discharged.[1] Those members of the public who might be tempted to commit

[1] There may be some question about the ease of discharging criminal fines in a Chapter 13 case. In *In re Gilliam* and *In re Young*, the two cases which held such fines

(Continued on next page.)

crimes such as the welfare fraud scheme involved in this case may be encouraged to proceed, since the perception will be that they have nothing to lose if criminal penalties can be avoided in bankruptcy.

CONCLUSION

All of the arguments made in the Pennsylvania and Connecticut briefs concerning the impact of this decision on the criminal justice system because it makes restitution orders dischargeable, apply equally to the court's holding that criminal fines and other penalties are dischargeable. The fact that the decision makes all penalties other than incarceration dischargeable means that the impact of the case, and the need for review by this Court, is greater than even Pennsylvania and Connecticut have argued.

Amicus urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,
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[1] *(Continued from previous page.)* dischargeable under Chapter 13, the debtors' plans provided for 100% payment of the fines. That is not the usual case, however. As Judge Wood stated in *In re Kohr*: "The majority of Chapter 13 cases are filed to save the home. Most provide very small payments to unsecured creditors. I have approved plans with no payments going to unsecured creditors. The strong principals enunciated in the *Kelly* case are totally inconsistent with the discharge of criminal penalties in a Chapter 13 case." 82 B.R. at 712.